TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 323

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

KANSAS CITY STRUCTURAL STEEL COMPANY

No. 324

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

KANSAS CITY STRUCTURAL STEEL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

(34454)
(34455)

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A [Caption omitted].

1 Before U. S. Board of Tax Appeals

Docket 6232

KANSAS CITY STRUCTURAL STEEL COMPANY, Kansas City, Mo., petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, respondent

For taxpayer: Phil D. Morelock, Esq., Armwell L. Cooper, Esq.
For the Commr.: O. Bennett, Esq.

Docket Entries

1925

Aug. 14. Petition received & filed.
" 17. Copy of petition served on solicitor.
" 17. Notification of receipt mailed taxpayer.
Sept. 5. Answer filed by solicitor.
" 11. Copy of answer served on taxpayer. Assigned 2-3-26.
Dec. 2. Motion that appeal be transferred to field calendar for hearing filed by taxpayer.
" 9. Order transferring to reserve calendar "C" for Kansas City Mo., hearing signed & filed. Both sides notified.

1927

July 22. Notice of hearing Oct. 19/27, Kansas City, Mo.
Oct. 19. Hearing had before Mr. Lansdon on merits. Stipulation of facts filed. Briefs due 12-18-27.
Nov. 29. Motion for an extension to 1-19-28 to file brief filed by taxpayer.
" 29. Granted to 1-19-28.

1928

Jan. 14. Brief filed by taxpayer.
April 30. Findings of fact & opinion rendered. Judgment will be entered for the respondent.
2 " 30. Order of redetermination entered.
Sept. 19. Supersedeas bond for $13,000 approved & ordered filed.
" 19. Petition for review by U. S. Cir. Ct. of Appeals, 8th Circuit, with assignments of error filed by taxpayer.
" 19. Præcipe filed by taxpayer.
" 19. Proof of service of petition & præcipe filed.
[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

Kansas City Structural Steel Co., Kansas City, Missouri.

Petition of Kansas City Structural Steel Company for appeal

Filed Aug. 14, 1925

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E:SM–JWN–21475–A–19632) dated June 17, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a Missouri corporation with principal offices at Kansas City, Missouri.

2. The deficiency letter (copy of which is attached) was mailed to the taxpayer June 17, 1925, and states a deficiency of $38,277.86.

3. The taxes in controversy are income and profits taxes for the calendar year 1918 and are more than $10,000.00, to-wit, about $20,000.00.

4. The determination of tax contained in said deficiency letter is based upon the following errors:

In its letter of January 5, 1924 (IT:CR:A–RPH–App), copy of which is attached, the Income Tax Unit showed an increase in net income of $34,988.78 as follows:

3 Structural stores	Reported by taxpayer	Corrected	Increase
Inventory 12/31/18	$446,984.06	$612,833.52	$165,849.46
" 12/31/17	271,827.87	402,688.55	130,860.68
Net increase			34,988.78

In a letter dated November 13, 1924 (IT:CR:A–JML), copy of which is attached, the commissioner decreased the item of $34,988.78 by $16,758.69. This was a deficiency letter but was withdrawn by the commissioner in order that the profits tax of this corporation might be computed under the provision of section 210 of the revenue act of 1917 and section 328 of the revenue act of 1918 for the calendar year 1917 and 1918. The deficiency letter of June 17, 1925, denies the application of the relief section for 1918. The taxpayer does not appeal from the decision of the commissioner with respect to the application of section 328 of the revenue act of 1918, but this appeal is based on statutory grounds in that the commissioner erred as follows:

(a) Increasing the inventory of the taxpayer as at December 31, 1917, by $130,860.68, and

(b) Increasing the inventory of the taxpayer as at December 31, 1918, by $148,090.78.

(c) Failure to recognize the fact that the taxpayer maintained an equivalent inventory of 5,554 tons of structural steel set aside and maintained which should have been priced at the original cost, to wit, $2.136 per cwt. f. o. b. Kansas City.

(d) The commissioner valued the entire inventory, including the equivalent inventory on a basis higher than cost.

(e) Failure of the commissioner to allow a loss in inventory as at December 31, 1918, due to the decline in March of 1919 of steel prices.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

(a) At the close of 1916 the corporation had on hand 5,554 tons of structural steel, which is set aside and maintained as an equivalent inventory and continuously kept it as such. In emergencies when material had been ordered from the mills and could not be delivered in time for use, steel was borrowed from the equivalent inventory and reimbursed upon arrival of mill deliveries. These 5,554 tons were inventoried at cost, to wit, $2.136 per cwt. f. o. b. Kansas City.

The corporation fabricates material for specific contracts and
4 carries no finished products in stock. So far as practical material is ordered and procured from the mills for specific structures or contracts. This rule and practice is fixed and determined. The equivalent inventory is kept on hand for emergency purposes and is not for sale, constituting a reservoir and not a merchandising stock. The commissioner has priced this equivalent inventory or reservoir, constituting one of the fixed assets of the corporation, at current prices. This equivalent inventory has been maintained as any other fixed asset owned and used by the company. It was not for sale, permanent in kind, quality, character, and quantity.

(b) In March, 1919 (between the 20th and 27th), prices were reduced from that which prevailed when the inventory was priced December 31, 1918, as follows:

Tank plates	$3.24 per cwt. f. o. b. Kansas City.
Steel bars	2.94 per cwt. f. o. b. Kansas City.
Structural shapes	3.04 per cwt. f. o. b. Kansas City.

During the first three and one-half months of 1919 the company sold and withdrew from stock:

January	1,507,930 pounds,
February	1,545,411 pounds,
March, ½	738,413 pounds,
	3,791,754 pounds of steel,

leaving an equivalent balance of the original, December 31, 1918, of 7,982,743 pounds. No physical inventory was taken in March, so that in figuring the following reduction, representing loss in inventory as at December 31, 1918, we proportion the same pro rata to the quantities in each class December 31, 1918.

Balance 3/15/19, 7,982,743 lbs., @ 3.4544		$275,755.84
Tank plates, 4,375,763 lbs., @ 3.24	$141,744.72	
Steel bars, 565,222 lbs., @ 2.94	16,617.53	
Structural shapes, 2,914,294 lbs., @ 3.04	88,594.54	
Scrap iron, 127,464 lbs., @ 1.00	1,274.64	
		248,261.43
Loss in inventory sustained		27,494.41

6. The taxpayer in support of its appeal relies upon the following propositions of law:

5 (a) The equivalent inventory of 5,554 tons on hand as at December 31, 1916, and maintained as a fixed reservoir should be priced at actual cost at each inventory period. No profit can arise from such an equivalent inventory because it was maintained as a fixed quantity and was not stock in trade but a permanent asset.

(b) Section 214 (12) (a), revenue act of 1918.

Wherefore the taxpayer respectfully prays that this board may hear and determine its appeal.

PHIL D. MORELOCK,
Attorney for Taxpayer,
710 Land Bank Building, Kansas City, Mo.

[*Duly sworn to by Fred H. Fitch; jurat omitted in printing.*]

Form NP-2.

TREASURY DEPARTMENT,
Washington, June 17, 1925.

IT:E:SM-JWN-21475-A-19632.

KANSAS CITY STRUCTURAL STEEL CO.,
1012 Baltimore Avenue, Kansas City, Mo.

SIRS: An audit of your income and excess-profits tax return for the calendar year 1917 and your income and profits-tax re-

6 turn for the calendar year 1918 has resulted in the determination of an overassessment for the year 1917 amounting to $23,428.45 and a deficiency in tax for 1918 of $38,277.86, as shown in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1924 you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has not been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consent-

ing to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-JWN-19740. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner*,
By J. G. BRIGHT, *Deputy Commissioner*.

Inclosures: Statements; agreement, Form A.

STATEMENT

IT:E:SM-JWN-21475-A-19632.

In re Kansas City Structural Steel Co., 1012 Baltimore Avenue, Kansas City, Missouri.

Years—	Deficiency in tax	Overassessment
1917	----------	$23,428.45
1918	$38,277.86	----------

7 1927

Reference is made to your protest dated April 3, 1925, against the allowance of your application for assessment of your profits tax under the provision of section 210 of the revenue act of 1917, as set forth in bureau letter dated March 20, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that the bureau holds that the comparatives used are representative concerns which meet all the requirements of section 210 of the revenue act of 1917 in the essential component parts and that the rate allowed is equitable. Accordingly the conclusions set forth in the above-mentioned letter are sustained.

Your case is therefore deemed closed.

1918

In bureau letter dated March 20, 1925, you were advised of the denial of your application for the assessment of your 1918 profits tax under the provisions of section 328 of the revenue act of 1918. This denial was based upon the fact that it was found that your profits tax as computed under the provisions of section 301 is not in excess of the average profits tax paid by a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

Changes having been made in the computation of your 1917 tax liability, the following recomputation has been made for the year 1918.

Net income, as shown in bureau letter dated November 13, 1924		$226,018.60
Invested capital, as shown in the letter mentioned above		1,119,487.02
Add:		
1917 Federal income tax, as previously prorated	$135,064.60	
Corrected adjustment, $223,064.62 × 200/365	122,227.17	
		12,837.52
Invested capital as adjusted		1,132,324.54
Excess-profits credit (8% of invested capital plus $3,000.00)		93,585.96
8 War profits credit:		
Average net income for pre-war period		39,308.48
Plus 10% of increase in invested capital of the taxable year over the average for pre-war period		85,703.42
Exemption		3,000.00
Total		128,011.90
War and excess-profits tax		78,405.43
Net income	$226,018.60	
Less:		
War and excess-profits tax	$78,405.43	
Exemption	2,000.00	
	80,405.43	
Amount taxable at 12%	145,613.26	
Tax at 12%		17,473.59
Total tax assessable		95,879.02
Tax previously assessed, account #41874		57,601.16
Deficiency		38,277.86

In accordance with the above conclusions, your claim for the refund of $26,000.00, income and profits tax assessed for the year 1918, will be rejected in full. The collector of internal revenue for your district will be officially notified of the rejection.

The overassessment shown above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district and will be applied by that official in accordance with section 281 (a) of the revenue act of 1924.

The right of appeal, as indicated on the first page of this letter, refers only to any deficiency in tax shown herein, inasmuch as there is no provision in the revenue act of 1924 granting the right to appeal from the determination of any overassessment found upon an audit of your returns.

A copy of this communication has been forwarded to your authorized representatives, Shouse, Doolittle and Morelock, 15 W. 10th Street, Kansas City, Missouri.

Kansas City Structural Steel Company

Year ended December 31, 1918

SCHEDULE 5.—*Proof of Invested Capital*

Capital stock		$500,000.00
Surplus		715,931.45
Reserve for emergencies		55,490.12
Total, corrected balance sheet beginning of year		1,271,421.57
Reductions:		
Dividends	$15,869.86	
Federal taxes	135,064.69	
Inadmissibles	702.55	
Total (deduct from above)		151,637.10
As shown on Schedule 3		1,119,784.47

SCHEDULE 6.—*Computation of excess-profits and war-profits credits*

Consolidated net income, taxable year (Schedule 1)	$244,155.69
Average consolidated net income, pre-war period (Schedule 1 of return)	39,308.48
Consolidated invested capital, taxable year (Schedule 3)	1,119,784.47
Average consolidated invested capital, pre-war period (revenues agent's report)	275,290.32
Increase in invested capital for taxable year as compared with average for pre-war period	844,494.15
Excess-profits credit:	
8% of invested capital for taxable year	89,582.76
Exemption	3,000.00
Excess-profits credit	92,582.76
War-profits credit:	
Average net income for pre-war period	39,308.48
Plus 10% of increase in invested capital as compared with average for pre-war period	84,449.42
Total	123,757.90
Exemption	3,000.00
War-profits credit	126,757.90

SCHEDULE 7

	Income	Tax
Excess-profits tax:		
Net income for taxable year	$244,155.69	
Less excess-profits credit	92,582.76	
Balance	151,572.93	
Taxable at 30%	131,374.13	$39,412.24
Taxable at 65%	20,198.80	13,129.22
	151,572.93	52,541.46
War-profits tax:		
Net income for taxable year	244,155.69	
Less war-profits credit	126,757.90	
Taxable at 80%	117,397.79	93,918.22
Less excess-profits tax		52,541.46
War-profits tax		41,376.77
Total excess-profits and war-profits tax		98,918.23

		Income	Tax
Income tax:			
Net income for taxable year		$244,155.69	
Less: War-profits and excess-profits tax	$93,918.23		
Exemption	2,000.00		
		95,918.23	
Taxable at 12%		148,237.46	$17,788.50
Total tax			111,706.73
Previously assessed			57,601.16
Additional tax to be assessed			54,105.57

TREASURY DEPARTMENT,
Washington, Nov. 13, 1924.

IT:CR:A–JML.

KANSAS CITY STRUCTURAL STEEL COMPANY,
1012 Baltimore Avenue, Kansas City, Missouri.

SIRS: An examination of your income-tax returns, books of account, and records for the year 1918, together with the information heretofore submitted, has been made, disclosing an additional tax liability of $39,181.61, and the results thereof are outlined in attached statement and schedules.

Waiver for 1918 is on file in this office.

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal
11 to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:A–JML. In event that you acquiesce in a part of the determination the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner,*
By O. BALLEN,
Deputy Commissioner.

Enclosures: Statements; agreements, Form A; Schedules 1 to 7, revised.

IT:CR:A–JML.

STATEMENT OF RETURNS

Examined and resulting tax liability:

Company—Kansas City Structural Steel Company.

Year 1918. Form 1120. Additional tax, $39,181.61.

Revenue agent's report dated October 23, 1920, bureau letter dated January 5, 1924, your brief dated January 30, 1924, and conference February 21, 1924, have been made the basis of adjustments which are fully explained in attached revised Schedules 1 to 71, inclusive.

All points of difference have been adjusted as agreed to by you in conference.

Relative to the loss on a part of the inventory as at December 31, 1918, based on value of the amount still on hand at March 15, 1919, the bureau holds that such loss is not allowable as a deduction under the provisions of section 214 (a) (12) of the revenue act of 1918 and article 265 of Regulation 45.

Waiver for 1918 has been filed.

12 Kansas City Structural Steel Company

Year ended December 31, 1918

REVISED SCHEDULE 1.—*Net income*

Net income as disclosed by bureau letter dated 1/5/24		$44,155.69
As corrected		226,018.68
Net deductions		18,137.01
Deductions:		
(a) Inventory	$16,758.68	
(b) Blacksmith furnace	1,030.58	
(c) Depreciation	347.75	
Total deductions, as above		18,137.01

REVISED SCHEDULE 2.—*Explanation of items changed*

(a) Inventory as at December 31, 1918, has been revised as shown in your brief and as agreed to in conference February 21, 1924, as follows:

Inventory as previously deducted		$612,833.52
" as corrected		596,074.84
Decrease		16,758.68

(b) This represents blacksmith furnace expensed in 1918 and allowed as a deduction in conference February 21, 1924.

(c) Depreciation on brick buildings has been revised as agreed upon in conference 2/21/24.

Cost beginning of year	$65,903.34	
" end " "	73,186.25	
Average	69,544.79	
69,544.79 at 2½%=		$1,738.62
Amount previously deducted		1,390.87
Additional deduction		347.75

REVISED SCHEDULE 3.—*Invested capital, 1918*

As shown in bureau letter dated 1/5/24	$1,119,784.47
As corrected	1,119,487.02
Net decrease, as explained below	297.45
Increases: (a) Inadmissibles	702.55
Decreases: (b) Missouri River Navigation stock	1,000.00
Net decrease, as above	297.45

13 REVISED SCHEDULE 4.—*Explanation of Items Changed*

(a) Since the inadmissible assets were restored in error as shown under (b) below, the amount deducted from invested capital on account of such inadmissible has been restored.

(b) Capital stock of the Missouri River Navigation Company added to invested capital in bureau letter dated January 5, 1924, has been deducted as agreed to in conference February 21, 1924.

REVISED SCHEDULE 5.—*Proof of invested capital*

Capital stock		$500,000.00
Surplus		714,931.45
Reserves		55,490.12
Total, corrected balance sheet beginning of year		1,270,421.57
Reductions: Dividends	$15,869.86	
Federal taxes, 1917	135,064.69	
Total (deduct from above)		150,934.55
As shown on Schedule 3		1,119,487.02

REVISED SCHEDULE 6.—*Computation of excess-profits and war-profit credits*

Net income, taxable year (Schedule 1)	$226,018.68
Average net income, pre-war period	39,308.48
Invested capital, taxable year (Schedule 3)	1,119,487.02
Average invested capital, pre-war period	275,290.32
Increase in invested capital for taxable year as compared with average for pre-war period	844,196.70
Excess-profits credit:	
8% of invested capital for taxable year	89,558.96
Exemption	3,000.00
Excess-profits credit	92,558.96
War-profits credit:	
Average net income for pre-war period	39,308.48
Plus 10% of increase in invested capital as compared with average for pre-war period	84,419.67
Total	123,728.15
Exemption	3,000.00
War-profits credit	126,728.15

14 REVISED SCHEDULE 7.—*Computation of total tax*

	Income	Tax
Excess-profits tax:		
Net income for taxable year	$226,018.68	
Less excess profits credit	92,558.96	
Balance	133,459.72	
Taxable at 30%	131,338.45	$39,401.54
Taxable at 65%	2,121.27	1,378.83
	133,459.72	40,780.37
War-profits tax:		
Net income for taxable year	226,018.68	
Less war-profits credit	126,728.15	
Taxable at 80%	99,290.53	79,432.42
Less excess-profits tax		40,780.37
War-profits tax		38,652.05
Total excess-profits and war-profits tax		79,432.42
Income tax:		
Net income for taxable year	226,018.68	
Less: War-profits and excess-profits tax	$79,432.42	
Exemption	2,000.00	81,432.42
Taxable at 12%	144,586.26	17,350.35
Total tax		96,782.77
Previously assessed		57,601.16
Additional tax to be assessed		39,181.61

TREASURY DEPARTMENT,
Washington, Jan. 5, 1924.

IT:CR:A–RJH–APP.

KANSAS CITY STRUCTURAL STEEL COMPANY,
1012 Baltimore Avenue, Kansas City, Missouri.

SIRS: An examination of your income-tax return for the year 1918, together with information heretofore submitted, has been made, and the results thereof are outlined in attached statement and schedules.

15 In accordance with the provisions of section 250 (d) of the revenue act of 1921 you are granted thirty days within which to file an appeal and to show cause or reason why this tax or deficiency should not be paid. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:CR:A–RJH–App.

Treasury Decision No. 3492, setting forth the privileges of taxpayers in cases of appeal, is attached for your information and guidance.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made,

or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the collector's list.

Payment should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

Inclosure: T. D. 3492; statement; Schedules 1 to 7, inclusive.

IT:CR:A-RJH-App.

STATEMENT OF RETURNS

Examined and resulting tax liability:

Company—Kansas City Structural Steel Co., 1012 Baltimore Avenue, Kansas City, Missouri.

Year 1918. Form 1120: Additional tax, $54,105.57.

Full detail of adjustments producing the above stated results are contained in attached Schedules 1 to 7, inclusive, revenue
16 agent's report dated October 23, 1920, committee on appeals and review recommendation No. 4747, and engineer's report dated October 9, 1920.

Kansas City Structural Steel Company

Year ended December 31, 1918

SCHEDULE 1.—*Net income*

Net income as disclosed by return		$177,178.87
As corrected		244,155.69
Net additions		66,976.82
Additions:		
(a) Emergency fund	$10,810.38	
(b) Inventories	34,988.78	
(c) Donations	1,056.00	
(d) Blacksmith furnace	1,030.58	
(e) Amortization	2,061.67	
(f) Depreciation	9,099.95	
(g) Emergency fund	8,134.21	
Total additions		67,181.57
Deductions:		
(h) Loss on farm		204.75
Net additions, as above		66,976.82

SCHEDULE 2.—*Explanation of items changed*

(a) Additions to emergency reserve are not allowed as a deduction from income as outlined in O. D. 964, C. B. #5, page 118.

(b) The net increase in income due to increase in inventories, amounting to $34,988.78, is explained as follows:

Structural stores	Reported by taxpayer	Corrected	Increase
Inventory, 12/31/18	$446,984.06	$612,833.52	$165,849.46
Inventory, 12/31/17	271,827.87	402,688.55	130,860.68
Net increase			34,988.78

(c) Additional donations were found by the revenue agent amounting to $1,056.00, as shown in report.

(d) This item is a capital item and is disallowed as a deduction from income in accordance with article 293, Regulations 45.

(e) Amortization is allowed here in the amount allowed on engineer's report dated October 9, 1920, and prorated as follows:

17	Allowed in 1918	$9,404.73	
	Allowed in 1919	1,706.58	$1,706.58
	Disallowed	355.09	355.09
		11,446.40	2,061.67

(f) Depreciation is disallowed, as shown by the following exhibit:

	Taken on return	Allowed on revenue agent's report
Buildings	$7,757.10	$3,268.84
Shop equipment	18,511.46	13,928.72
Furniture and fixtures	1,241.05	1,033.02
Heating system		179.08
Total	27,509.61	18,409.66

(g) This item was deducted from 1918 and is not an allowable deduction

(h) Loss on Greer County Farm, disallowed in 1917, is allowed here, as the actual loss was sustained in the year 1918.

SCHEDULE 3.—*Consolidated invested capital*

As reported on original return		$1,179,150.00
As corrected		1,119,784.47
Net decrease as explained below		59,365.53
Increases:		
(a) Buildings	$1,268.66	
(b) Shop Equipment	122.81	
(c) Greer County Farm	204.75	
(d) Erection equipment	9,497.52	
(e) Inventory adjustment	130,860.68	
(f) Furniture and fixtures	475.82	
(g) Missouri River Navigation stock	1,000.00	
(h) Heating equipment	2,558.24	
Total increase		145,988.48

Decreases:		
(i) Appreciation	$64,389.29	
(j) Reserve for depreciation	50,906.98	
(k) Federal taxes	73,485.33	
(l) Dividend	15,869.86	
(m) Inadmissibles	702.55	
Total decrease		$205,354.01
Net decrease, as above		59,365.53

18 SCHEDULE 4.—*Explanation of items changed*

(a) and (b) These items represent depreciation credited direct to asset account in 1910.

(c) The loss taken on the books in 1917 was not sustained until 1918, and accordingly this amount is restored to invested capital.

(d) The net book value of erection equipment was adjusted to the actual inventory submitted and results in an increase in 1917 income and 1918 invested capital.

(e) This adjustment was sustained by committee on appeals and review recommendation No. 4747.

(f) Depreciation set up in 1910 was credited direct to the asset account and is reversed here.

(g) In conference of November 10, 1922, this item was disallowed as a deduction from income in 1917 and is restored to surplus.

(h) Heating equipment expenses in 1917 is capitalized.

(i) Appreciation of land and buildings is eliminated from invested capital.

(j) Reserve for depreciation is increased by this amount and this action was sustained by the committee on appeals and review.

Increase in reserve for depreciation at 12/31/16	$56,412.66	
Excessive depreciation for 1917	5,505.68	
Net increase at 12/31/17		50,906.98

(k) Corrected income and excess-profits taxes for 1917 is prorated as follows:

246,493.97×200/365=	$135,064.50	
Prorated on return	61,579.36	
Net increase		73,485.33

(l) Dividends paid during the first sixty days of the year are deemed to have been paid from surplus, and are prorated from invested capital from date paid as follows:

19 $17,500.00×331/365= $15,869.86

(m) Inadmissible asset adjustment:

Average total assets	$1,595,352.24
Average inadmissible assets	1,000.00
Decimal	.000627
$1,120,487.02×.000627	702.55

Now, September 25, 1928, the foregoing petition certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Seal, U. S. Board of Tax Appeals, 1924.]

Before United States Board of Tax Appeals

Appeal of Kansas City Structural Steel Co., Kansas City, Missouri

Answer of Commissioner of Internal Revenue

Filed Sep. 5, 1925

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies, and alleges as follows:

1. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

2. Denies the allegation of error that the commissioner erroneously adjusted the inventories at the beginning and end of the taxable year 1918, as alleged in paragraph 4, subdivisions (a) to (d), inclusive.

3. Denies that any error was made in failing to allow the alleged loss in inventory as at December 31, 1918, as a deduction.

4. Denies all the material allegations of facts in paragraph 5 and subdivisions thereof in the petition.

5. Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

20 Propositions of law

1. Correct inventories in accordance with section 203 of the revenue act of 1918 have been used in determining the income for 1918.

2. The word "inventory" contained in section 203 of the revenue act of 1918 means the inventory as a whole.

3. The entire inventory of a taxpayer must be valued on the same basis.

4. A loss in inventory is deductible only under the provisions of section 234 (14).

Wherefore it is prayed that the petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:

BENJAMIN H. SAUNDERS,
Special Attorney, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Docket Nos. 6232, 13554

KANSAS CITY STRUCTURAL STEEL COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed Oct. 19, 1927

Stipulation of facts

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue and the Kansas City Structural Steel Company that the following statement of facts in the above appeal now pending before the United States Board of Tax Appeals is correct.

(a) Valuation of inventory

1. The Kansas City Structural Steel Company is a corporation organized and existing under the laws of the State of Missouri with its officers at Kansas City, Missouri.

21 2. The company duly rendered its tax returns to the collector of internal revenue for the sixth district of Missouri for the taxable periods under consideration.

3. The company is engaged in the fabrication and erection of structural steel plates for buildings, bridges, tanks, etc. It fabricates material for specific structures or contracts and carries no finished product in stock. Material is ordered and procured from the mills for each specific structure or contract, except that a supply of material, as shown in Exhibit A, has been kept on hand for emergency use (from which material is borrowed and replaced) to insure the prompt and orderly execution of contracts in view of delay, etc., incident to shipments from the mills and other exigencies affecting the availability for use when needed of material ordered for a particular job. When such material is used, it is charged to the contract at its replacement cost and is promptly replaced with material of a like kind and in a like quantity.

4. As at December 31, 1916, the company had on hand 5,554 tons of structural steel which it priced at $1.70 per hundredweight f. o. b. Pittsburgh, representing cost price. This price represented the highest normal market encountered since 1895. Beginning with 1916 the price of structural steel advanced suddenly until it reached $4.50 per hundredweight f. o. b. Pittsburgh for structural shapes and $9.45 per hundredweight f. o. b. Pittsburgh for tank plates. On September 24, 1917, the Government fixed the price of steel f. o. b. Pittsburgh as follows:

Structural shapes	$3.00 per hundredweight.
Tank plates	3.25 " "

Upon the relinquishment of Government control and subsequently prices per hundredweight f. o. b. Pittsburgh were as follows:

	1919	1920	1921
Structural shapes	$2.80	$2.45	$1.50
Tank plates	3.00	2.65	1.50

Refer to Exhibit B, extract from Iron Trade Review of January 1, 1925, page 100. See also Exhibit C.

5. The company, at the end of the years 1916, 1917, 1918, 1919, and 1920, valued its said supply of 5,554 tons at the cost price prevailing at the close of 1916, or $1.70 per hundredweight f. o. b. Pittsburgh. The total inventory as valued by the company and as valued by the commissioner, together with the difference, follows:

2 Date	Per company	Per commissioner	Increase
12/31/17	$271,827.87	$402,688.55	$130,860.68
12/31/18	446,984.06	612,833.52	165,849.46
12/31/19	449,976.69	562,992.28	113,015.59
12/31/20	319,189.26	436,302.87	117,113.61

As shown by Exhibit A, the total amount of petitioner's inventory dropped below the 5,554 tons during each year. However, it was replaced before the close of these years, except the years 1917 and 1921. The company had on hand at the stated dates the following amounts of steel in tons:

Date	Amount in tons	Date	Amount in tons
December 31, 1916	5,554	December 31, 1922	9,341
December 31, 1917	5,298	December 31, 1923	8,732
December 31, 1918	5,887	December 31, 1924	10,411
December 31, 1919	6,957	December 31, 1925	7,202
December 31, 1920	7,246	December 31, 1926	8,126
December 31, 1921	4,512		

All materials of like dimensions are piled piece upon piece in perpendicular piles. Materials for specific contracts is not included in above figures or shown on Exhibit A.

When the material on hand at the close of the year exceeded 5,554 tons, the excess was priced by petitioner at cost or market, whichever was lower. Beginning with December 31, 1921, and for subsequent years, after prices became normal, the entire inventory was priced by petitioner at cost or market, whichever was lower. The Commissioner of Internal Revenue in pricing the inventory of the company has disregarded the said fixed quantity of 5,554 tons, assuming that the last purchases represented the entire inventory and using said last purchases as a basis for valuation.

6. The following tons of steel were fabricated by the company yearly:

1916	27,999 tons.	1922	35,925 tons.
1917	28,319 "	1923	58,124 "
1918	20,266 "	1924	34,425 "
1919	31,432 "	1925	33,105 "
1920	40,827 "	1926	35,863 "
1921	27,040 "		

(b) Loss in inventory, 1919

In March, 1919 (between the 20th and 27th), prices were reduced from that which prevailed when the inventory was priced December 31, 1918, to the following:

Tank plates	$3.24 per cwt. f. o. b. Kansas City
Steel bars	2.94 " " " " " " "
Structural shapes	3.04 " " " " " " "

During the first three and one-half months of 1919 the company sold and withdrew from stock:

January	1,507,930 pounds.
February	1,545,411 pounds.
March, ½ of tonnage	738,413 pounds.
Total	3,791,754 pounds of steel.

There were on hand at December 31, 1918, 11,774,497 pounds of steel. After substracting therefrom the 3,791,754 pounds withdrawn from December 31, 1918, to March 16, 1918, there remained on hand March 15, 1919, 7,982,743 pounds of steel. No physical inventory was taken on March 15, 1919. In allocating the tonnage to the following classification the same proportion has been applied to the 7,982,743 tons which existed with respect to the inventory as at December 31, 1918:

Balance 3/15/19, 7,982,743 lbs., $3.4554		$275,755.81
Tank plates, 4,375,763 lbs., $3.24	$141,744.72	
Steel bars, 565,222 lbs., $2.94	16,617.53	
Structural shapes, 2,914,294 lbs., $3.04	88,594.54	
Scrap iron, 127,464 lbs., $1.00	1,274.64	248,261.43
Loss in inventory claimed by petitioner		27,494.41

The 3.4544 applied as a multiple in arriving at the value of the 7,982,743 pounds of steel on hand as at March 15, 1919, is the
24 average price of the composite inventory as at December 31, 1918, as established by the commissioner. The prices applied as multiples to the classes of material as at March 15, 1919, in computing the value of each class are taken from the Iron Trade Review plus 59 cents freight per cwt. to Kansas City.

No claim for abatement was filed under the provisions of section 214, paragraph 12 (a) of the revenue act of 1918.

ORRIS BENNETT,
Counsel for Respondent.
PHIL D. MORELOCK,
Counsel for Petitioner.

1912
1913
TONS
15000
14000
13000
12000
11000
10000
9000
8000
7000
6000
5000
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2134
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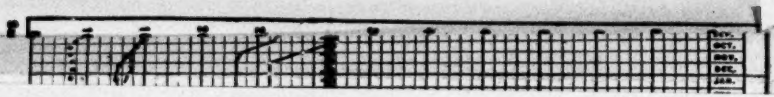

27, 28

Exhibit B

Market history

TANK PLATES, PITTSBURGH, 1895–1924

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1924	2.50 c.	2.45 c.	2.40 c.	2.35 c.	2.25 c.	2.15 c.	2.10 c.	2.00 c.	1.95 c.	1.90 c.	1.85 c.	1.90 c.
1923	2.05	2.15	2.35	2.45	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50
1922	1.50	1.40	1.45	1.50	1.60	1.65	1.70	1.80	2.00	1.00	2.00	2.00
1921	2.65	2.35	2.05	2.15	2.20	2.00	1.85	1.75	1.70	2.00	1.60	1.50
1920	3.10	3.70	3.75	3.65	3.50	3.50	3.50	3.50	3.50	3.20	3.00	2.65
1919	3.00	3.00	2.90	2.65	2.65	2.65	2.65	2.65	2.55	2.65	2.65	2.70
1918	3.25	3.25	3.25	3.25	3.25	3.25	3.25	3.25	3.25	3.25	3.25	3.25
1917	4.25	4.30	5.00	5.45	6.40	7.75	9.45	9.20	7.50	3.25	3.25	3.25
1916	2.50	2.55	3.15	3.50	3.50	3.50	3.50	3.75	3.70	3.70	3.90	4.25
1915	1.10	1.10	1.15	1.15	1.15	1.20	1.25	1.30	1.35	1.45	1.70	1.95
1914	1.20	1.20	1.20	1.15	1.15	1.15	1.15	1.15	1.20	1.20	1.10	1.10
1913	1.50	1.50	1.50	1.50	1.50	1.45	1.45	1.45	1.40	1.35	1.30	1.20
1912	1.15	1.10	1.10	1.20	1.25	1.25	1.30	1.35	1.40	1.45	1.50	1.55
1911	1.40	1.40	1.40	1.40	1.40	1.35	1.35	1.30	1.25	1.20	1.10	1.15
1910	1.55	1.55	1.50	1.50	1.50	1.45	1.40	1.40	1.40	1.40	1.40	1.40
1909	1.60	1.45	1.30	1.20	1.25	1.30	1.35	1.40	1.50	1.50	1.55	1.60
1908	1.70	1.70	1.70	1.70	1.70	1.65	1.60	1.60	1.60	1.60	1.60	1.60
1907	1.70	1.70	1.70	1.70	1.80	1.80	1.80	1.70	1.70	1.70	1.70	1.70
1906	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.70
1905	1.45	1.50	1.55	1.55	1.55	1.55	1.55	1.55	1.55	1.60	1.60	1.60
1904	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.40	1.40	1.40	1.50
1903	1.60	1.60	1.75	1.75	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60
1902	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60
1901	1.40	1.40	1.50	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60
1900	2.40	2.20	2.00	1.80	1.60	1.35	1.05	1.10	1.05	1.05	1.35	1.40
1899	1.30	1.45	1.75	2.05	2.10	2.30	2.45	2.55	2.85	2.80	2.50	2.30
1898	1.00	1.00	0.95	1.00	1.10	1.10	1.10	1.10	1.15	1.10	1.10	1.15
1897	1.10	1.10	1.10	1.05	1.05	1.00	1.00	1.00	1.00	1.05	1.00	1.00
1896	1.40	1.35	1.30	1.35	1.30	1.25	1.25	1.20	1.15	1.15	1.10	1.10
1895	1.15	1.10	1.10	1.15	1.20	1.25	1.60	1.70	1.80	1.70	1.60	1.50

29, 30

STRUCTURAL SHAPES, PITTSBURGH, 1895–1924

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1924	2.50 c.	2.50 c.	2.50 c.	2.35 c.	2.25 c.	2.20 c.	2.15 c.	2.05 c.	2.00 c.	2.00 c.	2.00 c.	2.00 c.
1923	2.05	2.15	2.35	2.45	2.50	2.50	2.50	2.50	2.50	2.50	2.50	2.50
1922	1.50	1.40	1.45	1.50	1.60	1.65	1.70	1.80	2.00	2.00	2.00	1.95
1921	2.45	2.25	2.10	2.15	2.20	2.05	1.90	1.75	1.70	1.60	1.60	1.50
1920	2.65	3.15	3.25	3.25	3.25	3.25	3.25	3.15	3.10	3.10	3.00	2.45
1919	2.80	2.80	2.70	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.50
1918	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00	3.00
1917	3.10	3.25	3.45	3.70	4.00	4.00	4.50	4.50	3.75	3.00	3.00	3.00
1916	1.85	2.05	2.40	2.50	2.50	2.50	2.50	2.50	2.60	2.70	2.90	3.00
1915	1.10	1.10	1.15	1.15	1.20	1.20	1.25	1.30	1.35	1.40	1.65	1.75
1914	1.20	1.20	1.20	1.20	1.15	1.10	1.10	1.15	1.20	1.15	1.10	1.05
1913	1.45	1.45	1.45	1.45	1.45	1.45	1.45	1.45	1.40	1.35	1.30	1.25
1912	1.15	1.15	1.15	1.20	1.25	1.25	1.30	1.35	1.40	1.45	1.50	1.55
1911	1.40	1.40	1.40	1.40	1.40	1.35	1.35	1.35	1.35	1.30	1.20	1.15
1910	1.55	1.55	1.50	1.50	1.50	1.45	1.40	1.40	1.40	1.40	1.40	1.40
1909	1.60	1.45	1.30	1.20	1.25	1.30	1.35	1.40	1.50	1.50	1.55	1.60
1908	1.70	1.70	1.70	1.70	1.70	1.65	1.65	1.60	1.60	1.60	1.60	1.60
1907	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70
1906	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70	1.70
1905	1.50	1.55	1.60	1.60	1.60	1.60	1.60	1.60	1.70	1.70	1.70	1.70
1904	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.40	1.40	1.40	1.40
1903	1.75	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60
1902	1.60	1.60	1.70	1.85	2.00	2.25	2.25	2.35	2.25	2.15	2.10	2.00
1901	1.50	1.50	1.50	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60	1.60
1900	2.25	2.25	2.25	2.25	2.25	2.05	1.90	1.75	1.70	1.70	1.70	1.70
1899	1.30	1.30	1.40	1.50	1.50	1.75	1.95	2.05	2.25	2.25	2.25	2.25
1898	1.15	1.15	1.15	1.15	1.15	1.15	1.15	1.20	1.20	1.20	1.20	1.20
1897	1.55	1.55	1.55	1.55	1.30	1.05	1.00	1.00	1.00	1.10	1.10	1.10
1896	1.45	1.50	1.45	1.45	1.50	1.55	1.55	1.55	1.55	1.55	1.50	1.45
1895	1.25	1.20	1.20	1.20	1.20	1.35	1.30	1.60	1.65	1.60	1.60	1.55

32 Now, September 25, 1928, the foregoing stipulation of facts, with Exhibits A, B, and C, certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[SEAL.]

33 Docket Nos. 6232, 13554

Before United States Board of Tax Appeals

KANSAS CITY STRUCTURAL STEEL COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated April 30, 1928

Petitioner maintained a minimum inventory which it priced each year at a figure which represented market in 1916. The inventory in excess of this minimum was valued at cost or market, whichever was lower. The respondent has recomputed the inventory value at market, disregarding the fixed minimum inventory. The determination of the respondent is approved.

Alleged loss in inventory under section 214 (a) (12) disallowed in the absence of evidence to show that materials included in the inventory at the close of the taxable year 1918 were disposed of at a loss during the succeeding taxable year or that such materials remained in the inventory at the close of the taxable year 1919, at which time their value was materially below the value at which they were inventoried at the close of the taxable year 1918.

Phil D. Morelock, Esq., and Armwell L. Cooper, Esq., for the petitioner.

O. Bennett, Esq., for the respondent.

The respondent has determined deficiencies in income and profits taxes for the years 1918 and 1920 in the respective amounts of $38,277.86 and $42,673.14. Only parts of the deficiencies are in controversy.

The petitioner alleges that the respondent erred in increasing its opening and closing inventories for the taxable years, in disallowing a loss in inventory as of December 3-, 1918, due to a decline of prices in March, 1919, and in disallowing a deduction for a bad debt in 1920. No evidence was introduced by petitioner in support of its claimed deduction for a bad debt in 1920 and such contention will be deemed to have been abandoned.

A stipulation of all the facts was entered into by the parties.

34 FINDINGS OF FACT

The petitioner is a corporation organized and existing under the laws of the State of Missouri, with its offices at Kansas City, Missouri.

During the taxable year it was engaged in the fabrication and erection of structural steel plates for buildings, bridges, tanks, etc., and fabricated material for specific structures or contracts. It carried no finished product in stock. Material was ordered and procured from the mills for each specific structure or contract, except

that a supply of material was kept on hand for emergency use to insure the prompt and orderly execution of contracts. When such material was used, it was charged to the contract at its replacement cost and promptly replaced with material of a like kind in a like quantity.

As at December 31, 1916, the company had on hand 5,554 tons of structural steel which it priced at $1.70 per hundredweight f. o. b. Pittsburgh, representing cost price. This price represented the highest normal market encountered since 1895. Beginning with 1916 the price of structural steel advanced suddenly until it reached $4.50 per hundredweight f. o. b. Pittsburgh for structural shapes and $9.45 per hundredweight f. o. b. Pittsburgh for tank plates. On September 24, 1917, the Government fixed the price of steel f. o. b. Pittsburgh as follows:

Structural Shapes	$3.00 per cwt.
Tank plates	3.25 " "

Following the relinquishment by the Government of control, prices per hundredweight f. o. b. Pittsburgh at the close of the taxable years were as follows:

	1918	1919	1920	1921
Structural shapes	2.80	2.65	2.45	1.70
Tank plates	3.00	3.10	2.65	1.80

Petitioner at the end of the years 1916, 1917, 1918, 1919, and 1920 valued its said supply of 5,554 tons at $1.70 per hundredweight f. o. b. Pittsburgh. The total inventory as valued by the company and as valued by the commissioner, together with the difference, follows:

Date	Per company	Per commissioner	Increase
12/31/17	$271,827.87	$402,688.55	$130,860.68
12/31/18	446,984.06	612,833.52	165,849.46
12/31/19	449,976.69	562,992.28	113,015.59
12/31/20	319,189.26	436,302.87	117,113.61

35 The total amount of petitioner's inventory dropped below the 5,554 tons during each year. However, it was replaced before the close of these years, except the years 1917 and 1921. The company had on hand at the stated dates the following amounts of steel in tons:

Date	Amount in tons	Date	Amount in tons
December 31, 1916	5,554	December 31, 1922	9,341
December 31, 1917	5,298	December 31, 1923	8,732
December 31, 1918	5,887	December 31, 1924	10,411
December 31, 1919	6,957	December 31, 1925	7,202
December 31, 1920	7,246	December 31, 1926	8,126
December 31, 1921	4,512		

All materials of like dimensions are piled piece upon piece in perpendicular piles. Material for specific contracts is not included in above figures.

The following tons of steel were fabricated by the company yearly:

1916	27,999 tons.	1922	35,925 tons.
1917	28,319 "	1923	58,124 "
1918	20,266 "	1924	34,425 "
1919	31,432 "	1925	33,105 "
1920	40,827 "	1926	35,863 "
1921	27,040 "		

When the material on hand at the close of the year exceeded 5,554 tons, the excess was priced by petitioner at cost or market, whichever was lower. Beginning with December 31, 1921, and for subsequent years, after prices became normal, the entire inventory was priced by petitioner at cost or market, whichever was lower.

The respondent in recomputing the inventory value for the taxable years has disregarded the fixed quantity of 5,554 tons and priced the entire inventory at market, as shown by petitioner's most recent purchases.

In March, 1919, between the 20th and 27th, market prices were reduced from those which prevailed when the inventory was priced December 31, 1918, to the following:

36	Tank plates	$3.24 per cwt. f. o. b. Kansas City.
	Steel bars	2.94 " " " " "
	Structural shapes	3.04 " " " " "

Steel prices remained relatively constant throughout the remainder of the year 1919.

During the first three and one-half months of 1919 the company sold and withdrew from stock:

January	1,507,930 pounds.
February	1,545,411 "
March, 1/2 of tonnage	738,413 "
	3,791,754 pounds of steel.

There were on hand at December 31, 1918, 11,774,497 pounds of steel. After subtracting therefrom the 3,791,754 pounds withdrawn from December 31, 1918, to March 16, 1919, there remained on hand March 15, 1919, 7,982,743 pounds of steel. No physical inventory was taken on March 15, 1919. In allocating the tonnage to the following classifications the same proportion has been applied to the 7,982,743 pounds as existed with respect to the inventory at December 31, 1918:

Balance 3/15/19, 7,982,743 lbs., $3.4544		$275,755.84
Tank plates, 4,375,763 lbs., $3.24	$141,744.72	
Steel bars, 565,222 lbs., $2.94	16,617.53	
Structural shapes, 2,914,294 lbs., $3.04	88,594.54	
Scrap iron, 127,464 lbs., $1.00	1,274.64	
		248,261.43
Loss in inventory claimed by petitioner		27,494.41

The 3.4544 applied as a multiple in arriving at the value of the 7,982,743 pounds of steel on hand as at March 15, 1919, is the average price of the composite inventory as at December 31, 1918, as established by the respondent. The prices applied as multiples to the classes of material as at March 15, 1919, in computing the value of each class, are taken from the Iron Trade Review, plus 59 cents freight per cwt. to Kansas City.

No claim for abatement was filed under the provisions of section 214 (a) (12) (a) of the revenue act of 1918.

37 OPINION

LANSDON: There are two questions presented for determination: (1) Which of two methods of inventory more clearly reflects the income, and (2) whether petitioner is entitled to deduct from its income for 1918 an alleged loss in inventory resulting from a decline in price of structural steel in March, 1919.

With regard to the first question, section 203 of the revenue act of 1918 provides:

"That whenever in the opinion of the commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the commissioner, with the approval of the secretary, may prescribe as conforming as nearly as may be best accounting practice in the trade or business and as most clearly reflecting the income."

On December 31, 1916, petitioner had on hand 5,554 tons of structural steel which it priced at $1.70 per hundredweight f. o. b. Pittsburgh, representing cost price. At the close of each of the years following until 1921 it valued its inventory by considering the 5,554 tons as constituting a fixed stock or minimum inventory which it priced at $1.70 per hundredweight. That part of the inventory which exceeded 5,554 tons was priced by petitioner at cost or market, whichever was lower. Each year an undetermined portion of the 5,554 tons was sold and replaced at a price substantially in excess of that used in valuing the 5,554 tons.

The respondent in recomputing the inventory value has disregarded the fixed quantity as used by the petitioner and has priced the total inventory at market.

The petitioner contends that the method used by the respondent reflects fictitious profits during the years of rapidly advancing prices and that this fictitious profit was eliminated in 1920 when prices again became normal. It contends, however, that in the meantime it has been subjected to a tax on this fictitious profit.

In the following regulation the commissioner has approved a basis for valuing inventories, the express purpose of which is to make it unnecessary to report fictitious profits:

"ART. 1582. [REGULATIONS 45.] Valuation of inventories: Inventories must be valued at (a) cost or (b) cost or market,
38 whichever is lower. * * * Whichever basis is adopted must be applied consistently to the entire inventory. * * *

Goods taken in the inventory which have been so intermingled that they can not be identified with specific invoices will be deemed to be the goods most recently purchased."

The petitioner has not elected to price its inventories at cost or market, whichever is lower.

Material was continually used by petitioner from the stock on hand to finish out contracts and for other emergency use. The contract price was computed on a basis of the then market price, which during the period of steadily advancing prices produced a substantial profit which included the increase in value. Petitioner's theory is that this profit derived from the increase in value was replaced in the inventory by repurchasing steel at advanced prices. It was profit realized, nevertheless, and it is none the less taxable because it was immediately reinvested in inventory.

The method used by the petitioner in valuing its inventory, which has been known to accounting as the "minimum," "cushion," "base-stock," or "constant average" method of inventory and hereinafter referred to as the minimum-inventory method, does not conform to the best accounting practice in trade or business. This method has not been widely adopted, and to sanction it in the case of the very small minority of taxpayers who have used it as petitioner has, only for a period of a few years, would work an unjustifiable discrimination against the great majority of manufacturers and dealers who have not used it.

The income-tax system is based upon an annual accounting period. The object of the inventory is to assign to each accounting period its profits and losses. The effect of the minimum-inventory method is to assign all profits and losses to the year in which this minimum inventory is liquidated. In fact, however, each sale or exchange of the individual items of the inventory is a realization of taxable profit or deductible loss in the year in which it occurs, and a method of accounting which disregards such realization does not truly reflect income. After the profit is realized it is immaterial whether it is immediately reinvested in inventory or is invested in some other manner. It is taxable when realized.

The practical result of the use of this method of inventory is to offset an inventory gain of one year against an inventory loss
39 of another year rather than to assign to each year its true gain or loss. Its use arises from a desire to play safe and provide reserves against possible future losses. The fact that sections 204, 214 (a), and 234 (a) of the revenue act, of 1918 authorize in some cases the carrying of a loss realized in one year into accounts of another year indicates that Congress did not intend that the ordinary inventory provisions should be construed to authorize such a transfer.

The evidence establishes clearly that some undeterminable part of the steel on hand in 1916 remained during the taxable years. All material of like dimensions was piled piece upon piece in perpendicular piles, with the result that the material most recently purchased

was in fact first used. If petitioner had used some means to identify the material so that its inventory could have been priced at cost, it might have obtained a more favorable result than that obtained through respondent's determination, which we are disposed to approve. The material in the inventory, however, is unidentifiable, and there has been offered no basis upon which we can determine cost of the inventory. The respondent computed the inventory value at market as disclosed by petitioner's most recent purchases, and adjusted both the opening and closing inventories for the taxable years on this basis. The determination of the respondent is approved.

Petitioner's second contention is that it is entitled to deduct from its net income for 1918 a loss in inventory sustained in March, 1919. Sections 214 (a) (12) and 234 (a) (14) of the revenue act of 1918 provide in part:

"At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. * * * (b) If no such claim is filed, but it is shown to the satisfaction of the commissioner that during the taxable year 1919 the taxpayer has sustained a substantial loss of the character above described, then the amount of such loss shall be deducted from the net income for the taxable year 1918 and the tax imposed by this title for such year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

During the first two and one-half months of 1919 petitioner withdrew from stock and fabricated for use under its contracts approximately one-third of the material contained in its closing inventory for 1918. We believe it is reasonable to assume that the remaining two-thirds was withdrawn from stock for similar use during the last nine and one-half months of 1919. The petitioner has not shown that any part of such material was sold at a loss. Neither has it shown that any of the material contained in its closing inventory for 1918 remained in stock at the close of the year 1919. If a reduction in market value of the items of inventory actually results in a loss, petitioner is entitled to a deduction under sections 214 (a) (12) and 234 (a) (14) of the revenue act of 1918. If during the year 1919 petitioner succeeded in retailing or manufacturing and selling without loss the goods contained in its closing 1918 inventory, it is entitled to no deduction, though the market value has been materially reduced. In Appeal of Carlisle Garment Co. (3 B. T. A. 1119), where it was held that in the absence of evidence that the inventory was sold at a loss during 1919 there could be no deduction from the 1918 income, the board stated at page 1123.

"A material reduction of the value of an inventory is not, in itself, sufficient to sustain a claim for a loss under this section. The material reduction must result in a substantial loss. * * * It appears further that the taxpayer manufactured the goods in its inventory at the close of 1918 and sold them during the year 1919. It does not appear that any loss whatever was sustained by the sale of these inventoried articles, nor does it appear that they were on hand at the close of 1919, included in the inventory of that year, or that the raw material content at that time of such inventoried goods, even if they were on hand at the close of 1919, could have been inventoried at a market value of less than cost. Under these circumstances, there is no evidence that the taxpayer has sustained a substantial loss resulting from any material reduction in the value of the inventory as taken at the close of 1918, and it is therefore not entitled to deduct the amount of the loss claimed for that year."

See also Appeal of Hayes Textile Co., Inc., (4 B. T. A. 1274), and Appeal of Otto A. Altschul (5 B. T. A. 53).

The evidence is clear that a material reduction occurred in the market value of petitioner's inventory in March, 1919. The evidence does not convince us, however, that petitioner has thereby sus-
41 tained a substantial loss, and it is therefore not entitled to the deduction claimed under sections 214 (a) (12) and 234 (a) (14) of the revenue act of 1918.

Judgment will be entered for the respondent.

Reviewed by the board.

Murdock concurs in the result.

Smith and Green dissent.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals, Washington

Docket No. 6232

KANSAS CITY STRUCTURAL STEEL COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination

April 30, 1928.

Pursuant to the board's findings of fact and opinion, promulgated April 30, 1928, it is

Ordered and decided: That upon redetermination there is a deficiency for the year 1918 in the amount of $38,277.86.

(Signed) W. G. LANSDON,
Member, United States Board of Tax Appeals.

Entered Apr. 30, 1928. Dated Washington, D. C. Enter.

[Certificate to foregoing paper omitted in printing.]

42

Before United States Board of Tax Appeals

Docket No. 6232

KANSAS CITY STRUCTURAL STEEL COMPANY, A CORPORATION, petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition of Kansas City Structural Steel Company for review of decision of United States Board of Tax Appeals

The above-named Kansas City Structural Steel Company, a corporation, hereinafter called petitioner, respectfully declares and shows:

I

This is a proceeding for the review of a decision of the United States Board of Tax Appeals rendered and promulgated on April 30, 1928, determining that there was a deficiency tax of thirty-eight thousand two hundred seventy-seven and 86/100, ($38,277.86) dollars in the Federal income tax of the petitioner for the year 1918.

II

The petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and having its principal office in Kansas City, Missouri, and duly and timely made its income-tax return for the year 1918 to the collector of internal revenue for the sixth district of Missouri, in which district Kansas City, Missouri is located.

III.

Petitioner seeks said review of said decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals of the Eighth Judicial Circuit. Said city of Kansas City, Missouri, and said district are located in said Eighth Judicial District. Said United States Circuit Court of Appeals of said Eighth Judicial Circuit has jurisdiction to review said decision of said United States Board of Tax Appeals.

IV

The nature of the controversy herein is as follows:

Petitioner was engaged in the business of fabricating and erecting, by contract, structural steel and steel plates for buildings,
43 bridges, tanks, and other structures, and fabricated and erected such material for each specific structure and contract and carried no finished product in stock. Material was ordered and procured from the rolling mills for each specific structure and

contract. However, a supply of material was kept on hand for emergency use only (under the practice herein set forth) to insure the prompt and orderly execution of contracts, in view of delays incident to shipments from the mills and other exigencies affecting the availability for use, when needed, of material ordered for particular and specific jobs. When in such emergencies material was so used from such supply, it was, upon receipt of the like material previously ordered for the particular job upon which such material was used, promptly replaced with material of a like kind and in a like quantity, thereby effecting an exchange of material, kind for kind and quantity for quantity. This practice was fixed and was consistently adhered to. Petitioner was not a merchant, and such material was not for sale and did not constitute a merchandising stock. On the contrary, it was a contractor for the delivery to its customer of the completed structure in place, involving and embracing all labor and material. The material was very heavy and was kept in convenient piles of like kind. When material was so used, it was taken from the top of the pile and when replaced was put on top of the pile from which the used material was taken or borrowed. The amount of such material on hand on December 31, 1916, was 5,554 tons, which petitioner set aside and substantially maintained for the emergency used under the practice aforesaid (and not otherwise), and priced it at its base cost of $1.70 per cwt. f. o. b. Pittsburgh, Pa., or with the freight added, at $2.136 per cwt. f. o. b. Kansas City, Missouri. This price also represented the highest normal market encountered since 1895. Petitioner contends that said fixed quantity of material should be regarded as a fixed asset and facility maintained for emergency use under the practice of exchange or borrowing and replacement aforesaid, and that no profits or income did or could accrue therefrom as a basis for the imposition of the tax complained of. Notwithstanding this contention and in disregard thereof, the Commissioner of Internal Revenue priced the same at the end of the year at the cost of a corresponding quantity of the most recent purchases of similar material and imposed a tax upon an erroneously assumed and fictitious income based upon the mere growth and increment in value of the said emergency material, viz, the difference between the value thereof as determined by the commisioner as of December 31, 1917, and the value
44 thereof as so determined by the commissioner as of December 31, 1918. This resulted in a fictitious increase of petitioner's taxable income of eighteen thousand two hundred thirty and 10/100 ($18,230.10) dollars, and an additional or deficiency tax of approximately seven thousand six hundred fifty-six and 74/100 ($7,656.74) dollars. An appeal was taken to the United States Board of Tax Appeals, which affirmed the action of the Commissioner of Internal Revenue and entered judgment acordingly. This appeal is from its action and judgment in that regard.

V.

Petitioner complains of the errors committed by the United States Board of Tax Appeals and says that said board erred in the following particulars:

1. In applying to petitioner's fixed quantity of emergency material the rules applicable to merchandising inventories.

2. In holding and deciding that material removed or borrowed from the emergency supply of material was sold at a profit and the proceeds invested in the replacement material.

3. In holding and deciding that each exchange of individual items of the emergency supply of material was a realization of taxable profit in the year in which it occurred, and that a method of accounting which disregards such realization does not truly reflect income.

4. By failing to recognize and hold that the 5,554 tons of steel was in fact a plant facility and convenience and not merchandise for sale and that it was and had been properly maintained as such for a period of years.

5. In holding and deciding that the growth and increment in value of the emergency supply of material was taxable income.

6. In not holding and deciding that under the agreed facts the judgment should be for petitioner.

7. Under the decision in this case and the interpretation placed upon the income tax law by the United States Board of Tax Appeals the said law is in conflict with and violation of the sixteenth amendment to the Constitution of the United States in that it permits the assessment and imposition of an income tax when there is no income in fact.

8. As to the other questions and taxes involved under the pleadings and agreed statement of facts filed with the said board petitioner assigns no error.

45 Wherefore petitioner respectfully prays the honorable United States Circuit Court of Appeals for the Eighth Judicial Circuit to reverse the decision rendered in the above-entitled cause by said United States Board of Tax Appeals, as aforesaid, and to decide that the additional or deficiency income tax complained of should not be assessed against petitioner and to award petitioner such other and further relief as may be just and proper, together with the costs taxable herein.

[SEAL] KANSAS CITY STRUCTURAL STEEL COMPANY,
By HOWARD A. FITCH. (Sgd.)
Attest: JOHN R. COOPER, (Sgd.)
Secretary.

ARMWELL L. COOPER, (Sgd.)
ELLISON A. NEAL, (Sgd.)
WHITSON ROGERS, (Sgd.)
Attorneys for Petitioner.

[*Duly sworn to by Howard A. Fitch; jurat omitted in printing.*]

[Certificate to foregoing paper omitted in printing.]

46 Before United States Board of Tax Appeals

Docket No. 6232

KANSAS CITY STRUCTURAL STEEL COMPANY, A CORPORATION, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Notice of petition for review

Filed Sept. 19, 1928

To the COMMISSIONER OF INTERNAL REVENUE:

Please take notice that the above-named petitioner has this day filed with the clerk of the United States Board of Tax Appeals a petition for review by the United States Circuit Court of Appeals for the Eighth Judicial Circuit of the decision rendered and promulgated in the above-entitled cause by said United States Board of Tax Appeals, and that a copy of said petition for review and of the præcipe for transcript are herewith delivered to you and served upon you by said petitioner.

Dated this 17th day of September, 1928.

ARMWELL L. COOPER,
ELLISON A. NEEL,
WHITSON ROGERS,
Attorneys for Petitioner.

COOPER & NEEL,
Of Counsel.

Due service, on this 19th day of September, 1928, of the above and foregoing notice, and of the petition for review and præcipe for transcript mentioned in said notice, is hereby acknowledged.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

47 Before United States Board of Tax Appeals

Docket No. 6232

KANSAS CITY STRUCTURAL STEEL COMPANY, A CORPORATION, petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Præcipe for transcript

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

The above-named petitioner, in connection with its petition for the review of the decision of the United States Board of Tax Appeals in the above-entitled cause by the United States Circuit Court

of Appeals for the Eighth Judicial Circuit, hereby requests you to prepare, certify, and transmit to the clerk of said court a transcript of the record in said cause and to include therein the following:

1. The docket entries of the proceedings before said United States Board of Tax Appeals.
2. The pleadings before said United States Board of Tax Appeals.
3. The agreed statement of facts filed in said cause.
4. The findings of fact, opinion, and decision of said United States Board of Tax Appeals.
5. The petition of said petitioner for said review.
6. The notice of the Commissioner of Internal Revenue of the filing of said petition and his acknowledgment of service.
7. This præcipe.

ARMWELL L. COOPER,
ELLISON A. NEEL,
WHITSON ROGERS,
Attorneys for said Petitioner.

[Certificate to foregoing paper omitted in printing.]

48 [Appearances of counsel omitted in printing.]

49 [Minute entry of argument and submission, Jan. 24, 1929; omitted in printing.]

50 In United States Circiut Court of Appeals, Eighth Circuit

No. 8358, May term, A. D. 1929

KANSAS CITY STRUCTURAL STEEL COMPANY, APPELLANT,

vs.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE

On petition to review decision of the United States Board of Tax Appeals

Before LEWIS, Circuit Judge, and WOODROUGH and MCDERMOTT, District Judges

Opinion

Filed May 14, 1929

MCDERMOTT, District Judge, delivered the opinion of the court.

This appeal brings on for review a decision by the Board of Tax Appeals sustaining a deficiency assessment against the appellant in the sum of $7,656.74. The case was presented to the board
51 upon a stipulation of facts. The board made findings of fact which are substantially as stipulated. There is no record of

any evidence being offered in addition to the stipulation, except that the opinion states—

"The evidence establishes clearly that same undeterminable part of the steel on hand in 1916 remained during the taxable years."

Whether there was other evidence of this fact is not material, for it is a natural inference deducible from the facts stipulated and found.

The question presented is whether, in arriving at the taxable income of the appellant, the commissioner had a right to consider the inventory value of a stock of steel, set apart by the appellant as an "emergency" or "reserve" or "stand-by" stock.

It is stipulated that:

"The company is engaged in the fabrication and erection of structural steel plates for buildings, bridges, tanks, etc. It fabricates material for specific structures or contracts and carries no finished product in stock. Material is ordered and procured from the mills for each specific structure or contract, except that a supply of material as shown in Exhibit A has been kept on hand for emergency use (from which material is borrowed and replaced) to insure the prompt and orderly execution of contracts in view of delay, etc., incident to shipments from the mills and other exigencies affecting the availability for use when needed of material ordered for a particular job. When such material is used it is charged to the contract at its replacement cost and is promptly replaced with material of a like kind and in a like quantity."

Upon argument it was stated and not denied that the business of the taxpayer consisted, in large part at least, of bidding for the steel work of buildings and bridges and other structures where steel is used; these bids are predicated upon firm offers procured from the mills for the steel involved, plus the cost of fabrication and a profit. If the bid was accepted, the materials were ordered for the job. This seems to be the only inference that can be drawn from the facts stipulated, to wit, "It fabricates material for specific structures or contracts and carries no finished product in stock" and "material is ordered and procured from the mills for each spe-
52 cific structure or contract." The taxpayer's business is closely akin to that of a building contractor, which, as far as steel is concerned, it is.

It is further stipulated that this emergency reserve consisted of 5,554 tons of structural steel, being the amount on hand on December 31, 1916. Its cost was $1.70 per cwt. f. o. b. Pittsburgh. It is stipulated that this price of $1.70 "represented the highest normal market encountered since 1895." From that date on until December 31, 1921, this steel was treated as above stipulated. All materials of like dimensions were piled piece upon piece in perpendicular piles. This stock varied in size during the year, being both below and above the 5,554 tons as material was used therefrom and replaced therein, the extreme limits from 1916 on, for any part of the year, being approximately 4,000 and 11,000 tons. Except for the years 1917 and 1921,

the reserve exceeded 5,554 tons on December 31 of each year. These years are not in controversy and the shortage was inconsiderable. Whenever the reserve exceeded 5,554 tons on December 31, the excess was valued at current prices and a tax paid thereon.

In figuring up its taxable profit for the years 1918 to 1920, inclusive, the appellant treated this emergency steel as a part of its fixed equipment and carried it at the 1916 cost price of $1.70 per cwt. The stipulation states:

"The company, at the end of the years 1916, 1917, 1918, 1919, and 1920, valued its said supply of 5,554 tons at the cost price prevailing at the close of 1916, or $1.70 per hundred weight f. o. b. Pittsburgh."

Since the reserve did not consist of the identical pieces in the pile on December 31, 1916, and which cost $1.70 per cwt., and since it was impossible to ascertain the cost of the steel actually in the pile, the commissioner inventoried the entire stock at the market price of the steel most recently purchased, under the rule prescribed by article 1582, regulation 45, that the presumption is "the first in, the first out." Whether this presumption is a fair one in the face of the actual probability that workmen would take a girder off the top of a pile instead of the bottom is challenged by the appellant, but need not be considered.

53 The result of the two methods of pricing the inventory was that the Government figured the income of the appellant to be $18,230.10 more than the appellant figured it. A deficiency assessment of $7,656.74 was made, and an appeal to the Board of Tax Appeals was unsuccessful, and the case is here on review.

Since the taxpayer figured this emergency steel as a part of its fixed equipment, no claim was filed for abatement under sections 214 (a) (12 and 234 (a) (14 of the revenue act of 1918 for inventory losses occurring when prices began to fall. On December 31, 1921, "after prices became normal" and when the price of the steel had dropped below the 1016 level ($1.50) the taxpayer acquiesced in the Government position, and the emergency reserve was priced by the taxpayer at its cost, or market, whichever was lower. It will thus be seen that the taxpayer had 5,554 tons of $1.70 steel on hand on December 31, 1916, and 5,554 tons of $1.50 steel of a like kind and in a like quantity on hand on December 31, 1921, and that no income had been enjoyed by the taxpayer through its maintenance of this reserve during the five years.

While no claim for abatement was made under the cited sections of the 1918 law, as recited in the stipulation, it does appear that before the Board of Tax Appeals the taxpayer asked credit for a loss in the inventory, due to the falling market in the year 1919. This claim is inconsistent with its present contention, and the record is not clear as to whether the taxpayer asserted this claim as a counter attack after the Government had asserted the right to tax the paper profits on the same steel during the advancing prices. The Board of Tax Appeals upheld the Government's right to tax the

profit on the advancing market, but denied the taxpayer the credit for losses on the falling market because they were not actual losses. The taxpayer has not appealed from that part of the order, but insists that if the board denies a credit for losses because they are not actual it ought not to tax income unless it is realized.

The good faith of the taxpayer is not questioned. The stipulation sets out facts indicative of good faith. The reserve was set apart when prices were at the highest level since 1895; during the succeeding years its market value doubled, and yet the taxpayer did not liquidate it and take its profit; it kept it until prices were below the 1916 level, and it showed a loss; although the amount
54 actually on hand, at the close of the year, was sometimes much more than 5,554 tons, it accounted for the excess to the Government. It must be assumed that the reserve was in fact maintained, for the purpose as stipulated, and it was reasonable in amount.

It will be seen at once that the underlying question is the propriety of including tnis reserve supply in an inventory taken as an aid to the ascertainment of income. Before dealing with that it may be as well to consider one or two arguments made by the Government in support of its position. It is urged that in 1921, when prices had gone down, the appellant itself included the entire emergency reserve at 1921 prices and that the taxpayer applies one rule when prices are high and another when prices are low. The Government makes the very sound argument that one of the prime requisites of any tax system is consistency; that when a tax-payer has adopted one system, it should be adhered to, in fair weather or in foul; and that no tax-payer should be permitted to play fast and loose with his Government. This very fair and sound rule does not apply, however, where the tax-payer changes his position at the Government's requirement; if the appellant is right in its contention, it cannot be denied relief because it, although still protesting, acquiesced in the ruling, either because the drop in price had eliminated any substance to the disagreement or because it became weary of the contest. It is also urged that the appellant, during these very years, included as a part of its income, the increase in value of the excess of the emergency steel over 5,554 tons, and thereby attested the correctness of the Government's position. The conclusion does not follow. As to the excess, the appellant doubtless recognized that an emergency supply must bear a fair proportion to the requirements of the business; having determined that 5,554 tons was an adequate reserve for a business that fabricated about 30,000 tons a year, it should account for any excess above that amount. Moreover, that the tax-payer may have paid more taxes than it should have is not adequate reason for a disposition of this case. The Government urges that this is but another claim of the right to set up a "minimum inventory" formerly but unsuccessfully claimed by retailers and dealers. If it is, then the appeal must fail; but that

is to assume the correctness of the real controversy, to which we now turn.

55 Inventories reflect what a man has, and not what he earns; they reflect capital, and not income; many times in practice they distort income. Many a merchant has paid an income tax predicated upon the cost or market of goods on his shelves, only to find that by the time the goods were sold he had sustained a loss instead of a profit. The bankruptcy courts of the deflation period were flooded with claims of unpaid income taxes of the preceding years, a taxation on an income never in fact realized—a paper profit in an inventory which was turned into a loss in a few short months.

The use of inventories to reflect income is resorted to from necessity. There are a great many business institutions that must either take into account their inventories or not compute their income at all. It is a financial if not a practical impossibility to ascertain the cost and selling price of each spool of thread sold by a retailer or each sack of flour made by a miller. If it could physically be done, the cost of the bookkeeping would be more than the gross receipts; hence not only the propriety, but the necessity, of the use of inventories in certain lines of business.

The statute recognizes this, and the statutory power to use inventories is predicated upon necessity. Section 203 of the revenue act of 1918 provides:

"That whenever in the opinion of the commissioner the use of inventories is necessary in order clearly to determine the income of any tax-payer, inventories shall be taken by such tax-payer upon such basis as the commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

The regulation enacted in pursuance thereto provides (art. 1581, Reg. 45):

"In order to reflect the net income correctly, inventories at the beginning and ending of each year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor."

Foulke on The Federal Income Tax (sec. 642) says:

"Inventories are necessary in business affairs according to the exigencies of each particular case. The statute provides that
56 inventories shall be used in income-tax accounting whenever necessary in the opinion of the commissioner to clearly determine income. The commissioner thus has discretion to determine whether or not in fact inventories are necessary and which discretion is no doubt subject to review by the court, although no case appears to have yet arisen. Inventories are necessary in those cases where owing to the quantity of goods or commodities involved in the transaction it is not practicable to keep a separate account of each piece. An inventory is simply a lumping method of determining the

gain or loss on the conversion of property in quantities where there is a fluctuation from year to year of the amount on hand, with a practical impossibility of separately itemizing the articles which are added or taken away."

It might correctly be said that the appellant is a fabricator, a constructor, and is not engaged in either the "production, purchase, or sale of merchandise," except as incident to its work of construction, just as a builder of houses buys lumber and nails, and gets a lump sum for the finished product. But we prefer that the decision rest on broader grounds.

At the outset it should be remembered that a wide discretion is vested in the commissioner, and not in the courts, and if the business is one where there is any substantial evidence indicating the necessity for the use of inventories, his decision, backed by majority opinion of the Board of Tax Appeals, should not be disturbed. On the other hand, if under the agreed facts a situation is presented where it is clear that the use of an inventory is not only not necessary, but as a matter of fact distorts rather than reflects income, then the appellant has a right to invoke the aid of the courts.

In approaching the problem it should be remembered that all of acts of the commissioner, all of the Treasury regulations, all of the taxing statutes, draw their vitality from the sixteenth amendment to the Constitution, which gives to Congress the "power to lay and collect taxes on incomes." The Supreme Court said:

"Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose
57 limitations alone that power can be lawfully exercised." (Eisner v. Macomber, 252 U. S. 189.)

See, to the same effect, Taft v. Bowers, decided by the Supreme Court of the United States February 18, 1929, and not yet reported.

The taxing statutes and the regulations prescribe rules and regulations as aids in arriving at true income and are not designed to create income. In all tax matters, as in most others, the form must give way to the substance. (Eisner v. Macomber, supra; Bowers v. Kerbaugh, 271 U. S. 170; Tucker v. Alexander, 25 F. (2d) 425 (8 C. C. A.).) The provisions of the statute or regulations should not be extended, by implication, beyond the clear import of the language used. "Doubts are resolved against the Government." (Gould v. Gould, 245 U. S. 151; U. S. v. Merriam, 263 U. S. 179; Hellmich v. Hellman, 18 F. (2d) 239 (8 C. C. A.).) And Judge Van Valkenburgh, now of this court, has said:

"This is, of course, the fundamental purpose of the law that the taxpayer should be taxed upon his actual income and that this should neither be diminished nor increased by any arbitrary or artificial method of computation. As the laws say, 'the true income must be clearly reflected,' and for this purpose the regular and long-stand-

ing methods of accounting employed by the taxpayer, established in due course and for no ulterior purpose, are to be indulged.

"* * * But if the books are kept, as the record shows they are, to show the exact state of the income upon completed contracts in each year, it is not perceived how greater difficulty can arise in the case of engineers than in that of building and construction work generally. Furthermore, the Government does not seek to secure a return upon income which is not accurate in fact and which casts an unjust burden upon the taxpayer." (In Re Harrington, 1 F. (2d) 749.)

Income has been authoritatively defined as "the gain derived from capital, from labor, or from both combined," and in referring to that definition the Supreme Court has said:

"Brief as it is, it indicates the characteristic and distinguishing attribute of income, essential for a correct solution of the
58 present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain,' which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived—'*derived from capital*,' '*the gain derived from capital*,' etc. Here we have the essential matters—*not* a gain *accruing* to capital, not a *growth* or *increment* of value *in* the investment, but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being '*derived*,' that is, *received or drawn by* the recipient (the taxpayer) for his separate use, benefit, and disposal; *that* is income derived from property. Nothing else answers the description." (Italics by the court.) Eisner v. Macomber, 252 U. S. 189.)

The regulations can not be broader than the statute. The statute authorizes the use of inventories, when "in the opinion of the commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer * * *." While no case has apparently decided the question, it is undoubtedly true that the opinion of the commissioner must be predicated upon facts reasonably justifying it; it may not be arbitrary. (Foulke on The Federal Income Tax, sec. 642.)

Is there any basis for determining that an inventory of this emergency steel is necessary in arriving at appellant's income prior to the time when it is liquidated? It is stipulated that the appellant "carries no finished product in stock"; that is, unlike a retailer or wholesaler or a miller, it is not a dealer. "It fabricates material for specific structures or contracts"; that is, it gets a contract first and then does the work. Except for the supply in question, and the excess inventory on which taxes are paid, "material is ordered and procured from the mills for each specific structure or contract"; that is, it buys on the market and at the market for each job. Some-

times when work is progressing the material ordered is delayed in shipment or transit; rather than delay the job, then and then only—"for emergency use (from which material is borrowed and replaced)"—the reserve steel in question is resorted to. When it is so used, "it is charged to the contract at its replacement cost and
59 is promptly replaced with material of a like kind and in a like quality"—presumably, as stated in argument, from the delayed car.

We have then this situation: The appellant is fabricating steel at Kansas City, some distance from steel mills; realizing the chance of delayed shipments, and in order to be able to compete in prompt execution of its contracts with other plants located near the mills, it carries a "stand-by" stock, replacing each girder used therefrom by the one ordered. There is in fact no profit at all realized from this emergency supply other than the reputation of promptly doing the work. The profit of each job is exactly the same as if it had no such reserve. The profit is the same as if it borrowed the steel from a neighbor instead of from this pile. In fact, it might very well be that half this reserve steel would go into a bridge that showed a loss on the entire contract. The pile is the same on December 31, 1916, as it is on similar days in each succeeding year, except for the two years noted and not here involved. As long as it remains intact there is no income from it, no matter what the market fluctuations are. When, if ever, it is liquidated, there will then be a profit or loss, but until then it is like its derricks and its cranes and its buildings; it is useful in the business, but until liquidated can show only paper profits which are neither realized nor taxable.

Upon argument it was urged that when the taxpayer took $1.70 steel out of the pile and put it in a $4.00 contract he made a profit, and whether he reinvested that profit in other steel that went into the pile is immaterial. This overlooks the stipulated facts. The taxpayer's contract was figured on $4.00 steel which he ordered from the factory; if a $1.70 girder was "borrowed" from the pile to-day, put into a bridge, and "replaced" to-morrow in "kind" with a $4.00 girder, there is no profit as long as he keeps the $4.00 girder for emergency use. In the briefs it is argued that the appellant is like a merchant, who constantly replenishes his stock, always striving to keep a stock on hand to meet the demands of his trade. That but begs the question. In the first place, inventories are "necessary" for the multitudinous transactions of merchants, who buy first and sell afterward; they are not necessary for those who keep no finished stock, who sell no goods, and who always
60 contract first and buy afterward. Moreover, merchants keep no stand-by stock for years, promptly replacing in kind each item borrowed therefrom.

Taking the whole business of the taxpayer, as stipulated, and bearing in mind the admonition that the substance and not the form

controls, we cannot escape the conclusion that, as a matter of fact, the existence or absence of this emergency supply doesn't add a dollar to the profit the taxpayer made on any contract he has ever executed; under the facts it cannot affect his income, except as a good reputation helps him to other contracts, upon which he will pay a tax. When he abandons or cuts down the emergency pile, then he must account for his profit over the 1916 price of $1.70; but, like his cranes and derricks, until he does dispose of them, no taxable income accrues from the mere ownership. The facts in this case show that on December 31, 1916, this steel cost the taxpayer $1.70 per cwt. All during the years he kept it up and used it as an emergency reserve; in December, 1921, it took it into account for tax purposes, a theoretical liquidation. On that date it was worth $1.50 per cwt., twenty cents less than it paid for it in 1916. Yet by virtue of its ownership the Government has assessed a tax predicated on a profit of $18,000.00. True income must be on an annual basis, and losses of this year may not offset profits of last. But here there was no actual profit in any year and no actual profit when liquidated. An Iowa farmer who owned $150.00 an acre land in 1916, and who sold it in 1924 for $150.00 an acre, cannot be taxed because in 1918 or 1919 it had a market value of $300.00 an acre. This analogy, it is true, overlooks the specific individuality of two identical girders which may be interchanged one day with the next—"borrowed" and "replaced." But that is of the form rather than of the substance. The appellant derived no income during the years from the ownership of this emergency supply; it was a part of its equipment for doing business; its business was such that it was not necessary to include it in the inventory to arrive at actual income; to so consider it distorts rather than reflects the true income of the taxpayer.

This decision is necessarily confined to the facts of this particular business. If the appellant were a merchant or a manufacturer, where inventories were necessary to arrive at income, it must take into account all of its stock, and cannot set apart a "minimum" in-
61 ventory. If the appellant, a builder, used this emergency supply for tucking away profits actually made, it could not escape. If there was bad faith, or an excessive reserve, it would be otherwise. If it liquidated the pile and took its profit, it must pay. But these are not the stipulated facts. The stipulated facts show a builder who keeps a supply of building materials against an emergency; it is reasonable in amount; it does not liquidate it on a high market and take its profit; it held it for years as a part of its fixed equipment; it never made a dollar out of it except as it enabled it to secure other contracts on the profits of which it paid a tax; its existence produced no income, and there should be no tax.

The order appealed from in this case, and in No. 8359, stipulated to abide this case, are reversed.

In United States Circuit Court of Appeals

Dissenting opinion

Filed May 14, 1929

WOODROUGH, District Judge, dissenting:

The tax-payer being a contractor, of course its true income for any year was the difference between the receipts from its contracts and the cost to it of fulfillment, due allowances being made. Obviously the collector could not get at this amount from the book figures of the company, because it charged the steel material for each job at the market, when, in fact, as stipulated, the same was supplied in part out of its own stock on hand, which had cost it less than the market. Avoiding impasse, both parties naturally turned to inventory. There is no suggestion in the stipulation that the collector compelled recourse to inventory. The taxpayer and the assessor both use inventory. The dispute is about the kind of inventory valuations that the taxpayer sets up. On account of rising prices for steel in 1917, 1918, and 1919 valuation at the market of the steel inventory on hand at the end of each of those years figured out a considerable gain which went into the assessment for income tax. After the fall of prices in 1920 the taxapyer benefited by corresponding reduction of its assessment and tax. It has undoubtedly paid tax on some gains which it did not liquidate into cash money, just as it got credit later on for a loss not actually paid out of pocket. But that is no ground to cancel the tax. That is what recourse to inventory for income-tax assessment means. The
62 taxpayer has not taken his gains in money. They are in his inventory, and the collector has to go there to find and assess them. I cannot see how this taxpayer stands in any different case than thousands of others whose inventory values rose and fell in the period. Many who were entitled to it got relief under the inventory loss abatement provisions of sections 214 (a) (12) and 234 (a) (14) of the revenue act of 1918. The matter of such rebate for appellant was considered by the Board of Tax Appeals, and it was denied after hearing and no appeal is prosecuted. Its valuation plan for its steel inventory wipes out all income from inventory gains and avoids the tax altogether, and so avoids all tax much more effectually than the mere abatement for loss contemplated and provided for by Congress. But its plan, as I see it, is nothing more nor less than the old minimum-inventory method, which does not conform to the best accounting practice in trade or business, this for the obvious reason that it conceals the profits and loss of the business and so defeats the object of keeping books. It arbitrarily picks out a time, December 31, 1916, when steel was at a certain price and settles on the amount of steel that happened to be on hand at

that time and proposes to carry that amount at that same price through the ensuing years of price advance, and then upon the fall of price and the return to normal to resume inventory of all its steel at the market or cost, if lower. Thus it eliminates consideration in particular years and defeats any assessments therefor, and the tax goes with it. Of course the company made some money by keeping an adequate stock of steel on hand and using it on a constantly rising market. But its plan of inventory valuation conceals the fact and excludes the Government from any share. If it had held its steel in its piles during the period, there might be room for argument. But it did not.

The stipulation consists with the steel having been kept for about the same purpose and used in about the same way that stocks of raw material are ordinarily kept and used in many lines of business. The structural shapes and plates were produced in Pittsburg and used at remote points. A stock had to be, and was, kept on hand, not enough of course to fill all contracts but enough "to insure prompt and orderly execution of contracts in view of delay, etc., incident to shipments from the mills and other exigencies affecting the availability for use when needed of material ordered for a
63 particular job." There is no suggestion that the use was only when there was unusual or extraordinary delay of shipments, merely the "delay incident to shipment"—not a use confined to extraordinary "exigencies," merely the exigency that the job has to be done here and the mills are at Pittsburgh.

No stocks are carried on hand by merchants, manufacturers, or fabricants from choice. It is always done to insure orderly and prompt dispatch of business, necessitated because the production or accumulation of goods or materials is at one point and the business at another. Such considerations suggest no test for the tax collector. His test is whether there is a continued commingling in an indistinguishable mass and a productive use out of the mass in the business. If there is, and the gains of the business are included in the increased value of the mass, he must compare the changing values of it every fiscal year, and that is what he has done in this case. The taxpayer had to carry a stock of steel and use it in its business. It fell as low as fifteen hundred tons in 1912 and rose as high as eleven thousand tons in 1920, but fluctuated always in both quantity and value, and no cost price of any piece was ever to be distinguished in the mass. The collector rightly valued it at the market from year to year, assessed the increase, when there was any, with other gains, and made deductions at the slump for losses. To upset this action seems to me to invite chaos in the collection of the revenues.

I am not unmindful of the words "emergency use" in the stipulation applied to appellant's use of the steel which it proposes to

put in minimum inventory. I think the commissioner acceded to the use of the words "emergency use" in the stipulation as reflecting appellant's mental processes about it. They refer to the contractor's preference to handle the steel direct from the mill to the place of fabrication and to the job without double handling at its yards when feasible, perhaps even direct from the mills to the job; the stipulation is not clear. It also refers to the preference that the stock be kept up to a desirable point as near as feasible. But the words cannot have any other reference or significance in the face of the plain admission in the stipulation that production was remote from the jobs to be done, and the material had to be carried in stock and used to insure orderly execution of contracts. I
64 take it that the same preference to avoid double handling of heavy stuff and to keep stock up is general, and so all such stocks are for "emergency" use in that sense. I do not understand that the court concedes any more to counsel's arguments likening the use of steel from the pile to a borrowing from a neighbor than I do, nor to the arguments about which structural piece came from the top or the bottom of the pile, nor to the matter of what pieces may have stayed in the pile all through the history. These are simply attacks upon the recourse to any inventories by the tax collector. I understand it is not intended to strike down the acts and regulations concerning resort to inventory for income-tax assessments, but the court discerns in the case of this taxpayer a peculiar situation amounting to an exception. It is to that conclusion, that there is anything peculiar about this stock carried or the uses made of it or the reasons for carrying it, that I can not agree. It was necessary to carry it because the points of production, fabrication, and use were remote; it was replenished as are other stocks, not evenly but with such intermittency that the mass fluctuated constantly; on a rising market it gathered the gains of the business and on collapse its shrunken value reflected the loss. If this taxpayer can get its money back, so should thousands, because the use of inventories is practically universal. Nor can the Government in the future count with any security upon the taxes it collects in times of rising prices. A span of years may even them up again, and by this minimum-inventory system of accounting payments cheerfully made on gains well recognized at the time will be recovered by the shrewd and wary at the expense of the general.

The tax was laid and paid for the year 1918, when we had ten million men registered for war and millions in the field. The company ought not to get it back, nor for the year 1919 (dependent case No. 8359) either, when the men were coming back—mostly.

65 In United States Circuit Court of Appeals, Eighth Circuit

No. 8358

KANSAS CITY STRUCTURAL STEEL COMPANY, APPELLANT

vs.

COMMISSIONER OF INTERNAL REVENUE

On petition to review decision of United States Board of Tax Appeals

Decree

May 14, 1929

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals for a review of a decision of said Board of Tax Appeals sustaining a deficiency assessment against the appellant in the sum of $7,656.74 and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decision of the said Board of Tax Appeals be, and the same is hereby, reversed, without costs to either party in this court.

It is further ordered by this court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals.

May 14, 1929.

66 In United States Circuit Court of Appeals

Motion for stay of mandate

Filed June 13, 1929

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of judgment herein.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court of the United States, within the three months' period provided by statute in that respect, a petition for certiorari to that court; that it is probable that such petition for certiorari will be filed; and that he believes it undesirable under such circumstances to have the mandate of this court issue in accordance with the general rules of the court.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
B. C.

67 In United States Circuit Court of Appeals

Order staying issuance of mandate

June 13, 1929

On consideration of the motion of appellee for a stay of the mandate in this cause for a period of three months from the date of the entry of decree in which to file a petition in the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of ninety days from and after May 14, 1929, the date of the entry of decree of this court, and if within said period of ninety days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

68–70 [Clerk's certificate to foregoing transcript omitted in printing.]

71 [Caption omitted.]

72 [Appearances of counsel omitted in printing.]

73 In United States Circuit Court of Appeals

Stipulation waiving printing of record, service of briefs, and for submission of cause on record and briefs in cause No. 8358

Filed Oct. 22, 1928

Whereas the questions of law involved in this case are identical with the questions of law involved in cause No. 8358, pending in this court, between the same parties, and whereas the facts are similar with the exception of certain amounts and the years involved,

Now therefore it is hereby stipulated by and between the parties, subject to the approval of the court, that the printing of the record herein and the printing and service of briefs herein may be waived and that this case may be submitted upon the record filed in cause No. 8358 and upon the briefs to be filed in said cause and that the

decision in cause No. 8358 shall control in this case, it being further stipulated that separate judgments and final orders of the Board of Tax Appeals shall be entered in the respective cases.

ARMWELL L. COOPER,
ELLISON A. NEEL,
WHITSON ROGERS,
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

74 [Appearance of counsel omitted in printing.]

In United States Circuit Court of Appeals

Order of submission

January 24, 1929

This cause having been called in its regular order, pursuant to the stipulation of counsel for the respective parties filed herein, the same is submitted to the court on the transcript of the record filed in case No. 8358, between the same parties, and upon the briefs of counsel filed in said cause.

In United States Circuit Court of Appeals

Note re opinion

The opinion of the United States Circuit Court of Appeals, majority and dissenting, filed in cause No. 8358, between the same parties, on May 14, 1929, and in pursuance of which the following decree was entered, is omitted from this transcript to avoid duplication, the same being set out in full in the transcript prepared in cause No. 8358 for filing with a petition for a writ of certiorari.

75 In United States Circuit Court of Appeals, Eighth Circuit

No. 8359

KANSAS CITY STRUCTURAL STEEL COMPANY, APPELLANT

vs.

COMMISSIONER OF INTERNAL REVENUE

On petition to review decision of United States Board of Tax Appeals

Decree

May 14, 1929

This cause came on to be heard, pursuant to stipulation of counsel for the respective parties, on the transcript of the record from the

United States Board of Tax Appeals in the case of Kansas City Structural Steel Company, appellant, vs. Commissioner of Internal Revenue, No. 8358, and the briefs of counsel filed in said cause.

On consideration whereof and in pursuance of said stipulation that the decision of this court in said cause No. 8358 shall control in this cause, and in accordance with the opinion of this court filed this day in said cause No. 8358, it is now here ordered, adjudged, and decreed by this court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed, without costs to either party in this court.

It is further ordered by this court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals.

May 14, 1929.

76 In United States Circuit Court of Appeals

Motion for stay of mandate

Filed June 13, 1929

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of judgment herein.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court of the United States, within the three months' period provided by statute in that respect, a petition for certiorari to that court; that it is probable that such petition for certiorari will be filed; and that he believes it undesirable under such circumstances to have the mandate of this court issue in accordance with the general rules of the court.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

77 In United States Circuit Court of Appeals

Order staying issuance of mandate

June 13, 1929

On consideration of the motion of appellee for a stay of the mandate in this cause for a period of three months from the date of the entry of the decree in which to file a petition in the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of ninety days from and after May 14, 1929, the date of the entry of decree of this court, and

within said period of ninety days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 13, 1929.

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 323, October term, 1929

Order allowing certiorari

Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 324, October term, 1929

Order allowing certiorari

Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

[Indorsement on cover:] File Nos. 34454, 34455. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 323: Commissioner of Internal Revenue, petitioner, vs. Kansas City Structural Steel Company. Term No. 324: Commissioner of Internal Revenue, petitioner, vs. Kansas City Structural Steel Company. Petition for writs of certiorari and exhibits thereto. Filed August 14, 1929. File Nos. 34454, 34455.

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